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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6848

JOHN LEE BOWEN,

Petitioner,

v.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

To Petitioner's knowledge there are no official or unofficial reports of the Order of the District Court denying John Lee Bowen's Motion to Suppress Evidence. The original opinion of the United States Court of Appeals for the Ninth Circuit affirming the instant search and seizure and Mr. Bowen's conviction is *United States v. Bowen*, 462 F.2d 347 (9th Cir. 1972). The first opinion of this Court granting certiorari,

granting leave to proceed in forma pauperis and remanding to the Ninth Circuit in light of *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2533 (1973), is reported as *Bowen v. United States*, 413 U.S. 915, 93 S.Ct. 3069 (1973). The en banc decision of the United States Court of Appeals for the Ninth Circuit, on remand is reported as *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974).

JURISDICTION

On May 9, 1974, the United States Court of Appeals for the Ninth Circuit, held that fixed checkpoint searches, away from the international border, not located at the functional equivalent of a border, without warrant or probable cause, violated the Fourth Amendment to the United States Constitution. However, the Court of Appeals further held that John Lee Bowen was not entitled to the benefits of said "new" ruling and that said ruling was made retroactive only until June 21, 1973, the date of this Court's ruling on *Almeida-Sanchez, supra. United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974).

A timely petition for writ of certiorari in the instant cause was lodged with this Court on June 7, 1974.

The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS

1. United States Constitution, Article III.
2. The Fourth Amendment to the United States Constitution.
3. The Fifth Amendment to the United States Constitution.
4. Title 8, U.S.C. § 1357.
5. Title 8, C.F.R. § 287.1(a) (2).

The foregoing have been set forth in the Appendix attached hereto.

QUESTIONS PRESENTED

Whether the constitutional principles requiring probable cause and warrants for searches reaffirmed in *Almeida-Sanchez, supra,* and in *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), Part I, involving "immigration searches" far removed from the international boundaries should be applied to John Lee Bowen who has challenged the validity of the instant seizure at all applicable judicial proceedings, and whose cause was pending before this Honorable Court on the date that *Almeida-Sanchez* was decided. Specifically:

1. Whether the United States Court of Appeals for the Ninth Circuit can refuse to apply the probable cause and warrant requirements for immigration searches far removed from the international boundaries of the United States articulated in *Almeida-Sanchez, supra*, to Petitioner, when *Almeida-Sanchez* did not

make "new law;" was itself based on fundamental Fourth Amendment law as enunciated in the "car search cases" and "administrative search cases;" and did not overrule any previous determination of the United States Supreme Court?

2. Whether the decision in Part I of *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), which held as "new law" the principle that fixed checkpoint searches away from the international boundaries of the United States must be conducted with probable cause and a warrant, must be applied to the litigant himself, John Lee Bowen, so that the opinion of the Court is not "mere dictum" and the "case or controversy" requirement of Article III, Section 2 of the United States Constitution would be followed?

3. Whether John Lee Bowen should be entitled to the fruits of his appeal from the United States District Court for the Central District of California, to the United States Court of Appeals for the Ninth Circuit, to the United States Supreme Court, back again to the United States Court of Appeals for the Ninth Circuit and back to the United States Supreme Court, when Mr. Bowen's matter was on "direct" appeal at the time of *Almeida-Sanchez, supra*, and where the result reached in *Almeida-Sanchez* was foreshadowed by previous Supreme Court decisions?

STATEMENT OF THE CASE

1. Petitioner was arrested on January 19, 1971, and a three count Indictment was returned against him on January 27, 1971, charging him with violations of Title 21, U.S.C. § 176(a) and 331(g)(3)(b).

2. On August 23, 1971, Petitioner's Motion to Suppress Evidence in connection with the instant cause was denied. On August 27, 1971, John Lee Bowen's jury trial commenced and on August 31, 1971, Mr. Bowen was found guilty as charged on all three counts on the Indictment. On October 7, 1973, Bowen was sentenced to seven years imprisonment. A timely Notice of Appeal was filed with the Ninth Circuit.

3. On June 16, 1972, the United States Court of Appeals for the Ninth Circuit affirmed Mr. Bowen's conviction in *United States v. Bowen*, 462 F.2d 347 (9th Cir. 1972); Bowen's Petition for Rehearing en banc was denied by said Court on July 24, 1972. A Petition for Writ of Certiorari and request for leave to proceed in forma pauperis were prepared and lodged with this Court on August 28, 1972.

4. On June 25, 1973, this Court granted Petitioner leave to proceed in forma pauperis, vacated the previous opinion of the United States Court of Appeals for the Ninth Circuit and remanded the cause back to the Ninth Circuit for further consideration in light of *Almeida-Sanchez, supra,* in *Bowen v. United States,* 413 U.S. 915, 93 S.Ct. 3069 (1973).

5. On October 23, 1973, the United States Court of Appeals for the Ninth Circuit voted to hold an en banc hearing on Petitioner's cause. On May 9, 1974, said Court held that fixed checkpoint searches away from the border, not located at the functional equivalent of a border, without warrant or probable cause, violated the Fourth Amendment to the United States Constitution. However, the Court of Appeals further held Petitioner was not entitled to the benefits of said "new" ruling as said ruling was made retroactive only until June 21,

1973, the date of this Court's ruling on *Almeida-Sanchez, supra. United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974).

6. A timely petition for writ of certiorari in the instant case, *Bowen v. United States*, was lodged with this Honorable Court on June 7, 1974.

7. On October 15, 1974, this Court granted Petitioner's Petition for writ of certiorari and leave to proceed in forma pauperis in the above-entitled cause.

ARGUMENT

I.

JOHN LEE BOWEN IS ENTITLED TO RELIEF PURSUANT TO THIS COURT'S DECISION IN *ALMEIDA-SANCHEZ, SUPRA*, SINCE THAT CASE PRESENTS NO CHOICE BETWEEN PROSPECTIVE OR RETROACTIVE APPLICATION OF NEW CONSTITUTIONAL PRINCIPLES OR INTERPRETATIONS; INSTEAD, IT MERELY REAFFIRMS THE WELL ESTABLISHED SUPREME COURT "CAR SEARCH CASES" AND "ADMINISTRATIVE SEARCH CASES."

In the proceedings in the United States Court of Appeals for the Ninth Circuit, on remand, that Court held in Part I of the decision that the warrantless search of Mr. Bowen's camper, conducted without probable cause, at a checkpoint over fifty miles from the international boundaries of the United States violated the Fourth Amendment. However, in Part II of the decision the Court further held that this holding established "new" law and therefore Mr. Bowen was not entitled to the benefits of said decision. In reaching this decision, the

divided Court held that to constitute a new rule a decision must:

> "(1) Overrule clear past precedent or (2) Disrupt a practice long accepted and widely relied upon.[1]" (Footnote omitted) 500 F.2d at 975.

The Court then found that fixed checkpoint searches had become established precedent under Title 8 U.S.C. § 1357(a) and that the Ninth Circuit had continually upheld convictions based upon evidence seized during searches made at fixed checkpoints. *United States v. Bowen*, 500 F.2d 960, 977, n.2 (9th Cir. 1974) The Ninth Circuit did not, and could not, cite any authority from this Court upholding the aforementioned statute or the result reached in the aforementioned cases. This reliance on lower Courts' decisions to determine whether "new law" is made, as opposed to decisions of this Honorable Court, would seem to be misplaced. See *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 879 (1973).[1]

In fact, the previous decisions of this Court have clearly indicated in analogous situations that searches such as the one directed against Mr. Bowen and his vehicle without probable cause or warrant were unconstitutional. As was stated in *Almeida-Sanchez, supra*:

> No claim is made, nor could one be, that the search of the petitioner's car was constitutional under any previous decision of this Court involving the search of an automobile." 93 S.Ct. at 2537.

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[1] An excellent opinion pointing out the chaotic effect of reliance on lower court decisions to determine whether a decision constitutes "new law" can be found in the dissenting opinion of Judge Hufstedler in *United States v. Bowen*, 500 F.2d 960, 985 (9th Cir., 1974).

The Court continued to state:

> "In seeking a rationale for the validity of the search in this case, the Government thus understandably sidesteps the automobile search cases. Instead, the Government relies heavily on cases dealing with administrative inspections. But these cases fail to support the constitutionality of this search." 93 S.Ct. at 2538

Indeed, ever since *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341 (1914), the exclusionary rule has been applied in federal cases to prohibit the introduction of evidence seized without probable cause and without warrant unless there were exigent circumstances. This Court has *never* allowed the fruits of a search not based upon probable cause into evidence.

In arriving at the decision in *Almeida-Sanchez, supra*, this Court merely followed the doctrine first enunciated by Mr. Chief Justice Taft in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925). *Carroll, supra*, merely dispensed with the warrant requirement for searching automobiles under certain limited circumstances while specifically reaffirming the constitutional necessity that all searches be based upon probable cause.

Carroll was followed by *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240 (1931), where Mr. Justice Stone (later Chief Justice), said:

> "The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, *if the search is upon probable cause.*" 51 S.Ct. at 241.

In *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949), the Court sustained the warrantless search

of an automobile by federal officers upon the ground that:

> "Each of the ultimate facts found in *Carroll* to constitute probable cause, when taken together, is present in this case and is fully substantiated by the proof. Accordingly, the *Carroll* decision must be taken to control this situation, unless it is now to be overruled." 69 S.Ct. at 1308.

Mr. Justice White relied on *Brinegar, supra*, and *Carroll, supra*, in reversing *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 88 S.Ct. 1472 (1968), stating:

> "Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. (Citing *Brinegar* and *Carroll*) The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. The record before us does not contain evidence that Sheriff Kirkpatrick, Deputy Sheriff Powers, or the officers who assisted in the search had reasonable or probable cause to believe that evidence would be found in petitioners' car." 88 S.Ct. at 1475.

In *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970), Mr. Justice White quoted with approval the *Carroll* holding:

> " '[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that the vehicles are carrying contraband or illegal merchandise. * * *

> " 'The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.' . . ." 90 S.Ct. at 1980.[2]

Similarly, the administrative search cases decided by this Honorable Court provide no basis for the conclusion that the decision in *Almeida-Sanchez, supra,* was "new" law. In fact, the administrative search cases substantiate Mr. Bowen's claim that a warrant and probable cause were required before his camper was susceptible to search under the Fourth Amendment. In *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727 (1967), the Court determined that the Fourth Amendment protections of a search warrant and probable cause applied to administrative searches of private residences:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual and that the reasons put forth in *Frank v. State of Maryland,* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protection." 87 S.Ct. at 1733

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[2] See *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971), where it was held that the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. 91 S.Ct. at 2035.

In a companion case, *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737 (1967), the Court held that the probable cause and warrant requirements of the Fourth Amendment applied to administrative searches of businesses:

> "The businessman like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." 87 S.Ct. at 1739 (387 U.S. at 543)[3]

It must also be remembered that this Court has consistently prohibited the infringement upon travel of United States citizens. *Aptheker v. Secretary of State,* 378 U.S. 500, 84 S.Ct. 1659 (1964); *Edwards v. California,* 314 U.S. 160, 62 S.Ct. 164 (1941); *Crandall v. Nevada,* 6 Wall. 35, 18 L.Ed. 745 (1868). The stopping and searching of Bowen and his vehicle fifty miles within the international boundaries of the United States certainly infringed upon his right to travel.

The Government should not be allowed to ignore the long standing principles clearly announced in the cases cited above. Such a policy would seriously undermine the Supreme Court's position as the final arbitrator of

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[3] cf. *United States v. Biswell,* 406 U.S. 311, 92 S.Ct. 1593 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 90 S.Ct. 774 (1970). Both of these cases require warrants before the fruits of a search of a business establishment may be introduced against the accused. Further, as these cases involve searches of well regulated business (firearms and liquor), the Court reasoned that the benefit of conducting these businesses allow the Government certain practices which would not be available against a private citizen. It certainly cannot be argued that Mr. Bowen was engaged in a "regulated business' when his vehicle was stopped and searched by immigration agents as he was driving on the open highway.

constitutional doctrine.

As can be seen from a review of the above cases decided by this Honorable Court, John Lee Bowen is not claiming the benefit of a decision overruling or enlarging "then applicable constitutional norms;" rather, he seeks the application of well established principles of constitutional law consistently delineated by this Court. Consequently, the question here is not whether *Almeida-Sanchez, supra,* should be applied retroactively, but whether 1925 *Carroll,* 1931 *Husty,* 1949 *Brinegar,* 1968 *Dyke,* 1970 *Chambers,* 1967 *Camara,* 1967 *See* 1868 *Crandall,* 1941 *Edwards,* and 1964 *Aptheker* should be applied prospectively to unconstitutional searches occurring after those dates. The affirmative answer to that question cannot seriously be disputed.

II.

ASSUMING, ARGUENDO, THAT THE DECISION OF THE NINTH CIRCUIT REQUIRING PROBABLE CAUSE AND A WARRANT TO SEARCH FOR ALIENS AT CHECKPOINTS FAR REMOVED FROM THE INTERNATIONAL BOUNDARIES OF THE UNITED STATES IS "NEW LAW," THE HOLDING IN THAT DECISION MUST BE APPLIED TO JOHN LEE BOWEN HIMSELF FOR THAT DECISION TO MEET CASE OR CONTROVERSY REQUIREMENTS OF ARTICLE III, SECTION 2 OF THE UNITED STATES CONSTITUTION.

Throughout the proceedings in the lower federal Courts and before this Honorable Court, John Lee Bowen has contended that a search at a fixed checkpoint away from the functional equivalent of a border, without probable cause or warrant, is prohibited by the Fourth Amendment. The United States Court of Appeals for the Ninth Circuit, *United States v. Bowen,* 500 F.2d 960 (9th Cir. 1974) (Part I), concluded that Bowen was correct in his argument. However, the Court refused to apply the rationale of this decision to Petitioner Bowen himself.[4] This refusal would seem to be in direct violation of the "case or controversy" requirement of Article III, Section 2 of the United States Constitution which provides as follows:

> "The judicial Power shall extend to all Cases, Law and Equity arising under this Constitution, the Laws of the United States and Treaties made,

[4] See Part II of the decision located at 500 F.2d at 975.

or which shall be made, under their Authority; —to all Cases . . .; —to Controversies to which the United States shall be a party. . ."

The refusal of the Court to apply the rule involving such checkpoints to Mr. Bowen himself rendered the decision outlawing these checkpoint searches "mere dictum." This was first recognized in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967); wherein the Court stated:

"We have recognized that Wade and Gilbert are, therefore, the only victims at pre-trial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity *that constitutional adjudications not stand as mere dictum.* Sound policies of decision-making rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies,[3] and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law,[4] militate against denying Wade and Gilbert the benefits of today's decisions." 87 S.Ct. at 1972 (Footnotes omitted) (Emphasis added).

See *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 1036, n.24 (1969).[5]

[5]Underlying policy reasons concerning development and refinement of constitutional law would seem to require that the benefits of a "new" decision go to the accused challenging the "old" rule. Any other decision would discourage defendants and their attorneys from seeking review of what they feel to be "unconstitutional" rulings. Without the incentive of allowing the new rule to apply to the moving party, there would be no incentive for constitutional litigation.

III.

THE CONSTITUTIONAL PRINCIPLES REAFFIRMED IN *ALMEIDA-SANCHEZ, SUPRA*, AND *UNITED STATES V. BOWEN*, 500 F.2d 960 (9th Cir. 1974), SHOULD BE APPLIED TO JOHN LEE BOWEN WHO HAS CHALLENGED THE VALIDITY OF THE INSTANT SEIZURE AT ALL APPLICABLE JUDICIAL PROCEEDINGS INCLUDING THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA; THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (TWICE) AND THE UNITED STATES SUPREME COURT (TWICE).

A. John Lee Bowen is Entitled to the Benefits of the Ruling in *Almeida-Sanchez* Because his Cause was Pending Before the United States Supreme Court on Direct Review when *Almeida-Sanchez* was Decided.

John Lee Bowen has challenged the validity of a fixed checkpoint search sixty miles away from the international boundaries of the United States from January 19, 1971 until the present. On May 9, 1974, the United States Court of Appeals for the Ninth Circuit, in interpreting *Almeida-Sanchez, supra*, held that searches conducted at fixed checkpoints, away from the functional equivalent of a border, without probable cause or warrant, were unconstitutional. However, even though John Lee Bowen's cause was pending before this Honorable Court when *Almeida-Sanchez* was decided, and the cause was then remanded to the Ninth Circuit for action not inconsistent with

Almeida-Sanchez, the benefit of the instant decision was not applied to Mr. Bowen himself.

This unconscionable result is in direct contradiction with the results reached by the United States Courts of Appeal for the Fifth and Tenth Circuits. In *United States v. King*, 485 F.2d 353 (10th Cir. 1973), the Court answered the contention that *Almeida-Sanchez* should not apply to the litigant in that case. The Court held:

> "In our view, that argument has no application to one in King's position. King, like *Almeida-Sanchez*, challenged on constitutional grounds the validity of the statute and regulation throughout the trial court proceedings and has pursued his challenge as well. And King now asks that he be given the same relief as has been afforded in *Almeida-Sanchez*. We agree." 485 F.2d at 359.

In *United States v. Maddox*, 485 F.2d 361 (10th Cir. 1973), the Court replied to a similar argument by emphasizing that the appellant in that case, like *Almeida-Sanchez*, had challenged on constitutional grounds the validity of the statute and regulation throughout the trial court proceedings and had continued to press that challenge throughout the proceedings:

> "And Maddox now asks that he be afforded the same relief as has been afforded in *Almeida-Sanchez*. We agree. 485 F.2d at 363.

In *United States v. Byrd*, 483 F.2d 1196 (5th Cir. 1973), the Court concluded that an appellant who was in exactly the same position on appeal as John Lee Bowen was before the Ninth Circuit on remand, should

be afforded relief under the doctrine of *Almeida-Sanchez*. In that case, the Court did not even deem it necessary to comment on the obvious point that defendants such as Byrd and Bowen, whose cases were on appeal before the Supreme Court at the same time as *Almeida-Sanchez*, should be allowed relief.

These decisions by the Fifth and Tenth Circuits were consistent with previous United States Supreme Court decisions concerning cases pending on direct review at the time a Supreme Court decision was rendered. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889 (1964); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229 (1963); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623 (1963); *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965).

To refuse to hold *Almeida-Sanchez*, *supra*, applicable to John Lee Bowen would be a grave injustice in the instant factual situation. As previously discussed, (see Argument I, *supra*) *Almeida-Sanchez* was not a "new" decision and, in fact, it was "foreshadowed" by previous Supreme Court decisions (see Argument III(B) *infra*). At each and every stage of the proceedings Mr. Bowen has contested the constitutionality of the search for, and seizure of, contraband in his camper. Mr. Bowen anticipated the *Almeida-Sanchez* decision and exhausted every possible avenue to avail himself of his Fourth Amendment rights. It would be a terrible injustice to deny Mr. Bowen the protections enunciated in *Almeida-Sanchez*, *supra*, in this instance.

Petitioner is not a "Johnny-Come-Lately" who is trying to take advantage of a recent Supreme Court decision; he is an individual who has demanded his rights at every stage of the proceedings against him. In

this light, it is important to note that the search of Petitioner's vehicle took place on January 19, 1971. Neither the decision in the Supreme Court nor the decision in the United States Court of Appeals for the Ninth Circuit in *Almeida-Sanchez, supra,* gives the date for the seizure in that matter. However, Petitioner is of the belief that the search in *Almeida-Sanchez* took place prior to January 19, 1971. It would be an anomaly to say that *Almeida-Sanchez,* who was searched prior to Petitioner, could have the evidence introduced against him suppressed, while Petitioner, who was searched at a later date, and who pursued the same avenues as *Almeida-Sanchez,* could not.

B. The Decision in *Almeida-Sanchez, supra,* and in *United States v. Bowen,* 500 F.2d 960 (9th Cir. 1974), Part I, was Foreshadowed by Previous Decisions of this Honorable Court and for this Reason John Lee Bowen Should Have the Benefit of Said Decision.

As indicated in Argument I, *supra,* the decision of this Honorable Court in *Almeida-Sanchez, supra,* was clearly foreshadowed by previous decisions of this Court.[6] For this reason, John Lee Bowen is in a

[6]See *Carroll v. United States, supra; Husty v. United States, supra; Brinegar v. United States, supra; Dyke v. Taylor Implement Co., supra; Chambers v. Maroney, supra; Camara v. Municipal Court, supra; See v. Seattle, supra; Aptheker v. Secretary of State, supra; Edwards v. California; supra;* and *Crandall v. Nevada, supra.*

different situation than the moving parties in other cases in which this Court has held the controlling decision not to be retroactive to matters on direct appeal.[7] As was stated in *Williams v. United States,* 401 U.S. 646, 91 S.Ct. 1148 (1971):

> "The petitioners in both *Linkletter* and *Desist* were convicted in proceedings that conformed to all *then applicable constitutional norms* . . . Each defendant, Linkletter by the habeas corpus route, and Desist on direct appeal, claimed the benefit of a later decided case and demanded a new trial . . . In these circumstances we found no constitutional warrant for setting aside either conviction." (Emphasis added) 91 S.Ct. at 1153 (401 U.S. at 654, 655).

Further support for this proposition is found in *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772 (1966), where the Court stated:

[7]Thus, *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160 (1971) held *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 (1968), which overruled *Lewis v. United States,* 348 U.S. 419, 75 S.Ct. 415 (1955) not to be retroactive; *Williams v. United States,* 401 U.S. 646, 91 S.Ct. 1148 (1971), held *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034 (1969), which overruled *United States v. Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430 (1950) not to be retroactive; *Desist v. United States, supra,* held *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507 (1967), which overruled *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564 (1928), not to be retroactive; *Tehan v. United States,* 382 U.S. 406, 86 S.Ct. 459 (1966), held *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229 (1965) which overruled *Adamson v. California,* 332 U.S. 46, 67 S.Ct. 1672 (1947), not to be retroactive; and *Linkletter v. Walker, supra,* held *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (1965), which overruled *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359 (1949), not to be retroactive.

> "Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." 86 S.Ct. at 1779.[8]

For these reasons, John Lee Bowen should be entitled to the benefit of the rule announced in *Almeida-Sanchez, supra,* and applied to fixed checkpoints in *United States v. Bowen,* 500 F.2d 960 (9th Cir. 1974).

C. Application of the Retroactivity Test First Enunciated in *Linkletter v. Walker* Indicates that John Lee Bowen Should be Given the Benefit of the Rule Prohibiting Warrantless Probable Causeless Searches of Vehicles at Fixed Checkpoints Within the International Boundaries of the United States Which are not the Functional Equivalent of the Border.

The Supreme Court has devised three criteria to be applied to the determination whether new constitutional rules affecting criminal trials are to be applied retroactively or prospectively.

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the affect on the administration of justice of a retroactive application of the new standards." 87 S.Ct. at 1970

Of these factors, the most important is the purpose to be served by the new constitutional rule. *Desist v.*

[8]See *Michigan v. Payne,* 412 U.S. 47, 93 S.Ct. 1966, 1971 (1973); *Adams v. Illinois,* 405 U.S. 278, 283, 92 S.Ct. 916, 920 (1972).

United States, supra. The question to be answered is whether the purpose of the rule is advanced by applying the rule retrospectively. The factors of police reliance and burden placed on the administration of justice by retroactive application have been significant in retroactivity determinations "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." *Desist v. United States, supra.*

1. *Purpose*: The purposes of the *Almeida-Sanchez, supra,* decision were to reaffirm prior case law relating to automobile searches, to enforce the Fourth Amendment, to protect the fundamental right of privacy by deterring illegal police action, and to protect the integrity of the judicial system. As *Almeida-Sanchez* has an exclusionary purpose, it is contended by the Government that it should have only prospective application. Since the decision in *Linkletter v. Walker, supra,* which gave partial retroactivity to the exclusionary rule of *Mapp v. Ohio, supra,* by applying it to all cases not final on the date of the *Mapp* decision, this Court has not given retroactive application to three Fourth Amendment decisions.

The decision in *Almeida-Sanchez* is quite unlike the decisions in the other Fourth Amendment exclusionary cases, and the purpose of the *Almeida-Sanchez* rule will indeed be advanced by retroactive application. *Almeida-Sanchez* applied well established Fourth Amendment law to protect the right of privacy by excluding from evidence materials seized without a warrant and without probable cause. *Almeida-Sanchez* announced no new rule of law, but was simply the application of the principles of *Weeks v. United States, supra; Carroll v.*

United States, supra; and *Camara v. Municipal Court, supra*, to a Government practice in contravention of these principles. Consequently, while *Almeida-Sanchez* is a Fourth Amendment case and applies the exclusionary rule, it is unlike other Fourth Amendment decisions in recent years since it did not amplify the evidentiary exclusionary rule, but affirmed existing standards that the Government had attempted to avoid. It is apparent that any decision with the purpose of reaffirming existing constitutional doctrine must receive retroactive application in order to advance the purposes of that decision.

Further, part of the purpose of the exclusionary rule has been ignored in previous decisions of this Court concerning retroactivity. Specifically, the Court talks to the aspect of the exclusionary rule of deterring illegal police conduct but it does not speak to the other purpose of the exclusionary rule which is the maintenance of the integrity of the judicial system. This purpose was established in *Weeks v. United States, supra*, where the Court stated:

> "The effect of the Fourth Amendment is to put the Courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to *forever* secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal Constitution, *should find no sanction in the judgments of the courts* which are charged *at all times* with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 34 S.Ct. at 344. (Emphasis added)

See *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

2. *Reliance*: The Government can point to no Supreme Court decision or statute authorizing such governmental practices as occured in the instant case. On the contrary, the applicable Supreme Court decisions and statutes, as the Court held in *Almeida-Sanchez*, provided no support for the legality of such searches. In this respect, the Government is in the same position as the petitioner in *Desist v. United States, supra*, whose case arose prior to the decision in *Katz v. United States, supra*. There petitioner argued that Supreme Court decisions leading to *Katz* had so undermined prior cases distinguishing between trespassory searches and those without physical penetration of premises, that that doctrine could no longer be considered controlling. Consequently, the petitioner contended that the decision in *Olmstead v. United States, supra*, not overruled until *Katz*, should not have been applied to electronic surveillance conducted before the date of that decision. The Court rejected this argument completely. Similarly, in this case, any Government argument that has relied on developing constitutional law to support *Almeida-Sanchez*-type searches should likewise be rejected. Surely,. if a defendant cannot rely upon case law evolution ultimately leading to a new decision to permit application of the new law to his case, the Government may not rely upon it to bolster its authority to engage

in searches and seizures ultimately declared illegal by the Supreme Court.[9]

Respondent further justifies denial of relief to Bowen on the premise that law enforcement relied upon the constitutionality of Title 8, C.F.R. §287.1(1)(2). This Honorable Court has never authoritatively construed this regulation to be constitutionally valid and no elected legislative body has passed such legislation. Therefore, the Justice Department's reliance upon its own administrative regulation is misplaced.

In any event, reliance on this regulation was unwarranted because of the fundamental principle of constitutional law that the Constitution cannot be amended by mere legislation or administrative regulation. *United States v. Arizona*, 400 U.S. 112, 91 S.Ct. 2060 (1970); *Marbury v. Madison*, 1 Cranch 137 (1803).

3. *Effect*: There is also the factor of the effect of the holding of retroactivity upon the administration of justice. Since we deal only with the issue at hand, that is, the retroactive application of *Almeida-Sanchez* to the case pending on appeal at the time of the *Almeida-Sanchez* decision, it can affirmatively be said that there will be little effect on the administration of justice. Cases not yet finalized may ultimately have to be reheard for many reasons, and this is fully accepted as a

[9]In other words, the Government contention that Title 8, U.S.C. §1357 and Title 8 C.F.R. §287.1(a)(2) as well as the more recent decisions of the Ninth Circuit evolved and displaced the probable cause requirement of *Weeks, Carroll* and *Camara* (so that the latter no longer controlled immigration car searches) simply do not hold water as *Almeida-Sanchez* made clear. Having been made clear, the Government is in no better position than the petitioner in *Desist* to argue reliance on such a rationale as a basis for prospective only relief.

part of our system of justice. Until such cases are final and the legal system's values respecting finality come into a play, cf., *Mackey v. United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 1171 (Harlan, J., concurring and dissenting) (1971), there is no deleterious effect upon the administration of justice of a retroactive application of a decision of the Supreme Court.

4. *Policy*: There are strong policy reasons why the supervisory powers of this Court should be invoked to apply *Almeida-Sanchez, supra,* and *Bowen v. Untied States*, 500 F.2d 960 (9th Cir. 1974), to John Lee Bowen whose case is currently before this Court on direct appeal. Many of these cases arrived on stipulated fact trial records in which defendants forfeited obvious plea bargaining advantages derived from guilty pleas in return for possible reversals after trial under *Almeida-Sanchez*. See *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971). By the practice of holding appeals in abeyance pending the Supreme Court decision in *Almeida-Sanchez*, the lower Courts affirmatively encouraged this practice. Now that *Almeida-Sanchez* has been decided in the accused's favor, for this Court to exclude the pending appeals on direct review from the benefits of the decision will cruelly dash the reasonable expectations of litigants who surrendered plea bargains in reliance upon the application of *Almeida-Sanchez* to their cases.[10]

[10]Petitioner is of the opinion that the "three-pronged retroactivity test" is fundamentally unfair when applied to cases which are on direct review at the time of the Supreme Court's decision. For this reason, John Lee Bowen would urge this Court to reconsider this test enunciated in *Stovall v. Denno, supra*, and to adopt the position expressed by Mr. Justice Harlan in his concurring and dissenting opinion in *United States v. Williams* and *Mackey v. United States*, 401 U.S. 675, 91 S.Ct. 1171 (1971).

If no Supreme Court decision relating to the exclusionary rule is to be given any retroactive effect, the Government may, with impunity, conduct illegal searches under the aura of promulgated search regulations or past patterns of conduct. It could then argue reliance on its own illegal regulations or practices to sustain a prospective only application of the Supreme Court decision invalidating its practice. Prospective application in such a case will take away the incentive the Government may have to act with greater caution and consideration in the drafting of regulations approaching the outer limits of the Fourth Amendment.[11]

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[11]If Respondent's argument is adopted, the lower federal courts can disregard established constitutional principles when new factual situations develop and incarcerate accused citizens upon this departure from precedent. The accused will then have no means of release from this aberration of established authority unless his particular case is reviewed by the United States Supreme Court and reversed or, unless he is not prosecuted until the United States Supreme Court rules on that particular problem. This simply cannot be the law.

CONCLUSION

For the aforementioned reasons, John Lee Bowen should be given the benefits of the decision in *Almeida-Sanchez v. United States, supra*, and of Part I of the decision in *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974). The application of these decisions to Mr. Bowen will require the exclusion of the seized marijuana and pills from evidence and it will necessitate a remand to the United States District Court for the Southern District of California to determine whether there is enough admissible evidence to proceed to trial against Mr. Bowen.

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APPENDIX

ARTICLE III.–THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jursidiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction,

both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

AMENDMENT IV– SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V–CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§1357. Powers of immigration officers and employees–Powers without warrant

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant–

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United states in violation of

any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.

Administration of oath; taking of evidence

(b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of Title 18.

Search without warrant

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search. June 27, 1952, c. 477, Title II, ch. 9, §287,66 Stat. 233.

Title 8, C.F.R. §287.1(a)(2)

"(2) *Reasonable distance.* The term 'reasonable distance,' as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section."